United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by: GUSTAVE H. NEWMAN

1495/76

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

FRANK ALTESE, SALVATORE ANNARUMO, SAVERIO CARRARA, MARTIN CASSELLA, JERRY D'AVANZO, MICHAEL DE LUCA, ANTHONY DI MATTEO, JOHN LOTIERZO SR., BARIO MASCITTI, ANTHONY MASCUZZIO, JAMES V. NAPOLI SR., JAMES NAPOLI JR., FRANK PINTO, CARMINE PIRONE, ROCCO RICCARDI, KENNETH ROSSI, EUGENE SCAFIDI, JOSEPH SIMONELLI, SABATO VIGORITO, ROBERT VOULO,

Defendant-Appellants.

BRIEF ON BEHALF OF APPELLANT VIGORITO

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Original

I N D E X

TABLE OF CITATIONS

(Other Citations Continued)

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BRIEF ON BEHALF OF APPELLANT VIGORITO

Preliminary Statement

The defendant SABATO VIGORITO was indicted together with 21 others in a multi-count indictment. The original indictment charged a multiplicity of violations but was pared down for trial purposes by a series of motions. The indictment, as it was tried, contained four counts which, despite their number in the original indictment, for ease of reference were numbered one through four.

Count one charged the defendants ANNARUMO, D'AVANZO, SCAFIDI and VOULO with operating an illegal gambling business between March 1972 and July 1972 in violation of Title 18, U.S.C., Sections 1955 and 2.

Count two charged the defendants DI MATTEO, MASCITTI, RICCARDI, SCAFIDI and VOULO with operating an illegal gambling business from December 13, 1972 to March 9, 1973 in violation of Title 18, U.S.C., Sections 1955 and 2.

Count three charged the defendants ANNARUMO, CARRARA, CASSELLA, DE LUCA, DI MATTEO, LOTIERZO, MASCITTI, MASCUZZIO, NAPOLI SR., NAPOLI JR., VIGORITO and VOULO with operating an illegal gambling business from April 13, 1973 until June 15, 1973 in violation of Title 18, U.S.C., Section 1955.

Count four charged all 20 defendants with conspiring to operate an illegal gambling business from February 26, 1971 through May 1, 1975 in violation of Title 18, U.S.C., Section 371.

At the conclusion of the Government's case, the trial court considered a series of motions. The Court dismissed the conspiracy count on the grounds that there were at least two conspiracies and, therefore, a fatal varience. Implicit in this, of course, was a finding of prejudice to defendants. The Court granted motions for a judgment of acquittal as to defendants CASSELLA, PINTO, ROSSI, ALTESE, SIMONELLI and PIRONE.

The jury acquitted four of the other remaining defendants, to wit: LOTIERZO, ANNARUMO, D'AVANZO and RICCARDI. The balance of the defendants were convicted. The defendant VIGORITO was convicted of count three of the indictment, ie., the operation of an illegal gambling business from April 13, 1973 to June 15, 1973 in violation of Title 18, U.S.C., Section 1955.

He was sentenced to imprisonment for a term of six months and a fine in the sum of $20,000 was imposed. A timely Notice of Appeal was filed. Defendant VIGORITO appeals from the aforesaid conviction.

STATEMENT OF FACTS

The evidence against the defendant VIGORITO consisted of the following:

Conversations attributed to the defendant VIGORITO which were intercepted by the eavesdropping device placed in a premises known as the Highway Lounge. These premises consisted of a bar and restaurant in Brooklyn. The devices were placed there pursuant to two orders. The orders were signed by Judge Bartels on April 12 and May 3, 1973. They are referred to throughout the motion to suppress, the trial and this brief as "Highway I" and "Highway II", respectively. The particular conversations in which the defendant VIGORITO was alleged to have participated were intercepted on April 27 and 30, 1973 and May 12, 13 and 15, 1973. In addition, there was testimony from a number of F.B.I. agents that the defendant VIGORITO was seen on other days entering and leaving the premises of the Highway Lounge during the period alleged in the indictment, ie., April 13, 1973 and June 15, 1973. A pre-trial motion to suppress was denied after hearings held on June 30, July 1 and July 2, 1976.

There was also testimony that was admitted into evidence on the theory of a prior similar act that the defendant VIGORITO'S fingerprint (one finger) was found on the blank side of a piece of paper found on February 26, 1971 in the premises of an acquitted co-defendant, one LOTIERZO. The other side of the paper contained gambling information. A motion to suppress by the co-defendant LOTIERZO was denied. The defendant VIGORITO did not testify in his own behalf. He offered documentary evidence in the form of a hospital record to show he was in the hospital and/or recuperating at a time the F.B.I. agents claimed

they spoke with him at the Highway Lounge. He also offered a witness, MR. MAROUDY, the controller of DeLite Records, to show that he was employed in a warehouse maintained by said company across the street from the Highway Lounge to explain his presence in the area generally and because of the lack of facilities in the warehouse to explain his going into the lounge particularly.

The conspiracy count against the defendants was dismissed; the Court denied the motion to dismiss the substantive count or to grant a severance and separate trial - that is, separate and apart from the defendants named in the remaining substantive counts, ie., counts one and two, in which the defendant VIGORITO was not named - on the grounds that any pretext for a joint trial was removed by dismissal of the conspiracy count. The jury convicted the defendant of the substantive count as aforesaid.

The defendant VIGORITO moved post-conviction to arrest judgment and set aside the conviction on the ground of prejudicial spillover by virtue of the joint trial since the conspiracy count was dismissed and for a dismissal of the substantive count on the ground that in reality, it was tried as a conspiracy by virtue of its nature and the Court's charge. Therefore, it was subject to the same attack on the ground of multiplicity and varience. This motion was denied on the date of sentence and the defendant VIGORITO was sentenced as aforesaid.

POINT I

THE INTERCEPTIONS AS TO HIGHWAY I AND HIGHWAY II ORDERS CONTINUED BEYOND THE DATE PROVIDED BY THE RESPECTIVE ORDERS.

As previously noted, the "Highway I" order was signed by Judge Bartels on April 12, 1973. It provided in its relevant portion that it was to continue until it accomplished its stated purpose or "for a period of fifteen [15] days [excluding Sundays] from the date of this Order, whichever is earlier."

By a plain reading of the language, the order was to continue in effect until-at the latest-April 27, 1973. In fact, it continued in operation until April 30, 1973. One of the conversations introduced into evidence against the defendant VIGORITO was intercepted on April 30, 1973.

The "Highway II" order was signed by Judge Bartels on May 3, 1973. It provided in its relevant portion that it was to continue until it accomplished its stated purpose or "for a period of fifteen [15] days [excluding Sundays] from the date of this Order, whichever is earlier." By a plain reading of the language, the order was to continue in effect until May 18, 1973. In fact, the interception pursuant to this order continued until May 19, 1973 [A-209]*. The Government under their reading contended that the expiration date of that order was in fact May 21, 1973 [A-212].

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*Numerical references preceeded by the letter "A" are to pages of the Appendix.

Aside from the actual introduction of any conversations intercepted beyond the date of expiration of the order, the fixing of that date assumes importance for the purpose of Point II of this brief - that is, as the point from which we compute the time that elapsed before the tapes were sealed.

The defendant VIGORITO, in his motion to suppress, raised this question of construction. The Court, in denying the motion to suppress, in all respects, did not address itself to this particular issue. However, implicitly, it opted for a construction of the order that extended Highway I to April 30, 1973 and Highway II to May 21, 1973, by concluding that in computing 15 days, Sundays were not to be counted. This can be seen from its decision on sealing and its colloquoy during the motion to suppress when, in discussing the sealing issue, the Court found that the tapes were sealed three days after expiration of the order. The interpretation urged by the defendants throughout the aforesaid motion to suppress was that the order was to expire no later than 15 days [in the case of Highway I, April 27, 1973; in the case of Highway II, May 18, 1973] and there was to be no interception on Sunday.

The testimony of Fred Barlow, the attorney in charge of the case, at the suppression hearing supports that interpretation. On cross-examination by Mr. Wild, Mr. Barlow was asked questions concerning the life of the order:

> "Q. In the Department of Justice was there any policy concerning the length of time that an application should be made in terms of the period of listening, the number of days -- during the time these applications were being made?

"A. Yes, sir, usually fifteen days, but in some instances more.

"Q. Was there any discussion in the Department of Justice that you would have more than 15 days by virtue of the exclusion of Sundays?

"A. No. The orders were for fifteen days." [A-232, 233]

The effect of the interpretation the prosecution advanced is that the order is extended beyond its expiration period of fifteen days without the required authorization of the Attorney General or his statutorily authorized delegated representative, and [illegible]el by a local special attorney.

Counsel is unable to find cases directly in point which construe the expiration date of the order. It seems, however, that the order should be strictly construed to the least extensive period, considering the unusual nature of electronic interception, the attempt of Congress as evidenced by the enactment of Title III to regulate it carefully, and general judicial interpretation of the statute.

In U.S. v. Gigante, 538 F.2d 502 [2 Cir. 1976], this Court speaking through its Chief Judge, suppressed tapes for the failure to "punctilliously observe" the sealing requirement. Language of a general nature contained in that decision at page 503 supports our argument for strict construction of the orders:

> "Justice Brandeis tellingly observed almost 50 years ago that 'writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.' Olmstead v. United States, 277 U.S. 438, 476, 48 S.Ct. 541, 571, 72 L.Ed. 944 [1928] [dissenting]. Mindful of this potential danger, Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et. seq., prescribed specific and detailed procedures to ensure careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits."

In connection with this extraordinary remedy, had the Government intended to have the order run 15 days plus Sundays, it could have merely given a date certain for expiration, which would have been within the statutorily permissible limits. The Government drafted the order and any ambiguity in its construction, if indeed any exists, should be construed against it. We contend, however, that basically there is no ambiguity and the plain meaning is 15 days with no interception permitted on Sundays.

This construction is relevant to the sealing issue since it extends the period between expiration and sealing by three additional days. As to VIGORITO and other defendants, it would bar from admission into evidence at the trial the conversation of April 30, 1973. The exclusion of this conversation would also have a serious effect on the validity of the order of May 3, 1973, since it was a vital part of the affidavit and a key basis for the claim of probable cause.

The conversation that was intercepted on April 30, 1973 purports to involve the defendant VIGORITO together with the defendant JAMES NAPOLI JR. and an unknown male. It is the longest conversation purporting to involve the defendant. Assuming, as we must for the purpose of this brief, that it involves the defendant, then we suggest that its deletion seriously weakens, if not destroys, the prosecution's case against this defendant for the charge in the indictment.

This contention is borne out by the fact that this was the only conversation involving the defendant VIGORITO that was proferred to the expert witness Harker for evaluation as involving gambling activity [T-5301, 5302]* It suggests a recognition on the part of the prosecution that the only proof of VIGORITO'S involvement in the count he was convicted of emanates from the April 30th conversation.

It assumes such critical proportions that we have taken the liberty of attaching for ease of reference the five conversations as footnotes to this point. The footnotes will be numbered 1 through 5 and will refer to the conversations in chronological order with number 2, of course, referring to the conversation of April 30, 1973.

The letter references in the appropriate conversation denote the following:

S or SV - the defendant VIGORITO;

JN - the defendant JAMES NAPOLI SR;

N or JNJ - the defendant JAMES NAPOLI JR.

Examination of these five conversations indicates that the one dated April 27th involved a discussion of trying to identify who a certain person is from his nickname and lasts no more than two minutes.

The conversation of May 12th involved a discussion concerning an individual with a complaint who the defendant wants another person to talk to and explain the situation. It shows presence and knowledge at best, but certainly not management and control of a gambling operation during the period in question.

*"T" refers to pages of trial record which, due to filing joint appendix, were omitted and are annexed at the end of this brief.

The conversation of May 14th, 1973 involves a discussion of the arrest by the police of an individual by the name of Raymond and the fact that the police took monies from him and conversation of this policeman with the defendant. It also indicates that a police officer takes money. Again, it indicates at most knowledge on the part of the defendant.

The final conversation of May 15, 1973 lasts about one minute and indicates knowledge on the part of the defendant that a certain echelon of the police had been eliminated. The conversation of April 30, 1973, it is submitted, is the only one referrable to any direct activity by this defendant in managing, supervising or funding a gambling operation during this period. Thus, in the case of this defendant, the construction of the order assumes grave importance and is not mere harmless error.

As to the other facet of our argument, ie., that it provided probable cause for the application of May 3, 1973, this is borne out by the affidavit of Agent Parsons. He states in his affidavit that prior to that conversation there was no probable cause to intercept the conversations of JAMES NAPOLI JR., and by his affidavit he certainly had no probable cause as to the defendant VIGORITO. Indeed, Barlow never even named VIGORITO in that order, or the subsequent Highway III order.

It is submitted, on any objective basis, that the strained construction applied by the learned trial court flies in the face of the plain words of the orders.

POINT II

THE TAPES WERE NOT SEALED IN ACCORDANCE WITH THE STATUTORY REQUIREMENTS. THEREFORE, THEY SHOULD BE SUPPRESSED.

The evidence to establish count three of the indictment, ie., operation of the gambling business between April 13, 1973 and June 15, 1973 was solely the conversations recorded at the Highway Lounge between April 12, 1973 and May 17, 1973. This evidence was garnered solely through the use of electronic eavesdropping devices placed in the Highway Lounge premises. These devices were placed there pursuant to two Court orders - one of Judge Bartels' which was signed on April 12, 1973 and another signed by Judge Bartels on May 3, 1973. The tapes of conversations intercepted pursuant to the order of April 12, 1973 were purportedly sealed by an order signed by Judge Bartels on May 3, 1973 which reads as follows:

> "Pursuant to Title 18, United States Code, Sections 2518[8][b], the taped recordings of conversations intercepted pursuant to this court's order of April 12, 1973, are ordered to be and they hereby are sealed, and placed in the custody of the Federal Bureau of Investigation."

The tapes of conversations intercepted pursuant to the order of May 3, 1973 were purportedly sealed by an order signed by Judge Neaher on May 24, 1973. That order reads as follows:

> "Pursuant to Title 18, United States Code, Code, Sections 2518[8][b], the taped recordings of conversations intercepted pursuant to this court's order of February 20, 1973, are ordered to be and they hereby are sealed, and placed in the custody of the Federal Bureau of Investigation."

The Government contended that it was brought to Judge Neaher for sealing since Judge Bartels was on vacation. The explanation for the fact that it referred to an order of February 20, 1973 rather than May 3, 1973 was that it was a typographical error because the secretary who typed it used an earlier sealing order relevant to the February 20, 1973 order and did not change the date [A-222]. The word immediately slipped the assistant's mind [A-221]. No diary controls in New York or Washington were kept as to sealing [A-224 ,225].

The Government's explanation for the delay in sealing the tapes from both orders either within three or six days, depending on which method of calculation this Court uses, ie., the Government's or the one advanced by the defendants in Point I of this brief, was generally that they submitted the tapes for sealing on the date the next order was signed.

It should be noted that a third interception order relating to the Highway Lounge was obtained on May 24, 1973 from Judge Neaher. The tapes obtained thereunder were suppressed by consent since they were not sealed until September 13, 1973.

The delay in sealing was sought to be explained by the Government on the basis that it needed time to process their application. As to the delay in sealing the tapes seized pursuant to the order of April 12, 1973, the Government concluded that they started to process the next order on May 1, 1973 [A-231]. The assistant travelled to Washington with the necessary papers [A-231]. Although he attempted to

convey th impression that the review process in Washington is lengthy, he did not explain why it took until May 1, 1973 to process the next application for the order of May 3, 1973. He was conducting interception from April 12, 1973 through April 30, 1973. Prior to the expiration of the orders of April 12 and May 3, by his own testimony, he decided to apply for another order [A- 220]. He offered no reason for waiting until May 1st to process the papers. He did not explain why he waited until the day when he applied for another order to have the earlier tapes sealed.

The order of May 24, 1973 is not at issue at bar for the reasons previously set forth, but is relevant because on the date it was signed, the tapes seized pursuant to the order of May 3rd were sealed. The assistant testified that he was "pretty sure" that he flew to Washington to process that application and order [A-223 ,231]. He offered no testimony when this occurred or when he decided to apply for the May 24th order, or why he postponed sealing until he applied for a new eavesdrop order.

During the interim between interception and sealing, the tapes were kept by Agent Parsons in a file cabinet in his office. He believed he had the only key but was uncertain whether there were other keys in existence [A-206A]. It was not a special cabinet. Approximately 100 other agents occupied and actively worked in that room [A-207 , 209]. On some occasions, he received the tapes the day after the interception. The individual boxes the tapes were in were not sealed [A-210]. The procedure followed upon sealing was that a large box containing a series of tapes was sealed, not the individual boxes containing the tapes [A210,215] On some occasions when Parsons was out of the office, the tapes were given to another agent to whom he gave the key to the cabinet [A- 211.

The agent also stated that the wait to seal was predicated upon the plan to have them sealed when the next order was signed [A-212,213]. The agent testified that the tapes were taken by him from the file cabinet and reproduced and returned prior to their sealing [A-213,214].

The prosecutor testified that on certain occasions when Agent Parsons did not receive the tapes on the same day they were recorded, but on a subsequent day, during the hiatus, another agent would keep the tapes in his custody [A- 226].

The Court denied the motion. The Court based its decision upon its conclusion that the tapes were sealed at the time of the signing of another order in the case of Highway I, of course, Highway II, and in the case of Highway II, Highway III and that these subsequent orders were extensions of the earlier ones and were obtained expeditiously.

Title 18, U.S.C., Section 2518[8][a], which establishes the sealing requirement, provides in its relevant portion:

> "[8][a] The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any section shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders."

The trial judge rejected the sealing argument, holding that Highway II and Highway III were extensions of Highway I and, therefore, the sealing of Highway I and II were within the lifetime of the extensions. He held that the delays were the result of a "backup" in Washington. He placed reliance on the case of U.S. v. Wac, 498 F.2d 1227 [6 Cir. 1974]. The relevant contention in that case dealt with an authorization to intercept signed by Sol Lindenbaum,

ie., the so-called "Giordano"* issue. The Court in Wac [supra] was called upon to determine whether it was required to suppress the material seized pursuant to a second order on the theory that it was an extension of the first and based upon material seized under the first order as required by Section 2518[1][f]. The Court in Wac held it not a literal extension order, but held the material seized thereunder suppressable because a significant portion of the supporting affidavit for the second order consisted of conversations overheard through the first order. Thus, in Wac, the Court did not make a determination on the vital issue at bar, ie., extension. Wac, at best, rhetorically discussed the elements that may exist in an extension. We submit that although Highway II and III at bar contain the words "continued interception", they are not extensions.

It has often been stated that the presence or absence of key phrases will not determine whether a person's rights have been observed. At bar, Highway I names six people whose conversations were sought to be intercepted. Highway II names six also - four of the six named in both orders are the same. Highway III names nine people to be intercepted - of those, five are the same as mentioned in Highway I and five are the same as mentioned in Highway II - four additional names are added to Highway III. The premises involved is the same although there appears to be evidence that the location of the devices were changed between orders and even during the life of the order. As a matter of law, however, the order cannot be said to be extended. Firstly, we suggest that there was not a strict compliance with Section

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*U.S. v. Giordano, 416 U.S. 505.

2518[1][f] in that the results of prior interceptions and a reasonable explanation for failure was not set forth. Excerpts* were repeated but only in an attempt to furnish probable cause for the new order. Beyond this, however, by the plain meaning of words, Highway II and III cannot be construed as extensions. An extension has been defined as a "prolongation" (Funk & Wagnalls New Standard Dictionary of the English Language). This presupposes, of course, that something is in existence to be prolonged. Clearly, at bar both prior orders had terminated. The only question is when? The Government contends three days, the defense six. No matter the time, dead they were. Thus, there was nothing to prolong. What was required was not prolongation, but reincarnation. Highway II and Highway III were each "new" orders for the same premises. The Wac case [supra] does not support the trial judge's determination because in its rhetorical discussion it placed emphasis on the immediate application for an order. At bar, by no stretch of the imagination was the three to six day hiatus "immediate". We submit, should this Court adopt the strained legal construction below, it would invite every prosecutor who failed to timely seal to apply within the three to six days of expiration of an order, call it "continued", and cure this otherwise strictly construed and applied defect.

As previously indicated, there seems to be a paucity of judicial decisions on the law of extensions. We could find no specific definition of extension in the statute, Title 18, Section 2510 et. seq. There is nothing in the legislative history to provide guidance on the meaning of an extension. In the absence of any material on the subject in the statute, recourse to the New York State statute which tracks the Federal statute in contents, principal and spirit is illuminating.

*Portions of conversations intercepted pursuant to the prior order.

Section 700.40 of the Criminal Procedure Law of the State of New York provides as follows in its relevant portion:

> "§ 700.40 Eavesdropping warrants; order of extension
>
> "At any time prior to the expiration of an eavesdropping warrant, the applicant may apply to the issuing justice, or, if he is unavailable, to another justice, for an order of extension..."

This statute clearly indicates that to be an extension, the subsequent order must be applied for prior to the expiration of the carlier order. By any standard of measurement, the successor order at bar was not applied for until the earlier order had expired. Therefore, despite the nomenclature , they were not extensions.

We also submit that the prosecution did not meet the strict burden as applied in U.S. v. Gigante [supra] and U.S. v. Ricco, 421 F.Supp. 401 [Lasker, J., S.D.N.Y. 1976], with a suggestion of a backup problem in Washington. They were aware of conditions in their own office and the decision certainly was made early during the life of the preceding order so it only required expeditious decision making and processing. Their sloth and backup in Washington should not permit the flouting of congressional and judicial will.

If we assume arguendo that Highway II and Highway III were in fact extensions of Highway I and II respectively, then we submit that the delay in obtaining the extensions was violative of the statute and the explanation was insufficient to excuse the delay in sealing (U.S. v. Gigante, supra).

The statute, of course, mandates immediate sealing. There has not been a case defining what would be considered "immediate". At

bar, of course, dependent on which construction is used, the delay in applying was either three or six days.

The importance of the word "immediately"* in the context of this section cannot be disputed. It is the only section of Title III that uses the word when talking of time requirement. Thus, other sections talk in terms of "as soon as practicable"** or "within a reasonable time"***. Now else does the statute establish so rigid a mandate. The legislative history of the statute clearly establishes that this is not by chance

Thus, in discussing the section, it was stated:

> "The recording must be made in such a way as will protect it insofar as possible from editing or alteration. Appropriate procedures should be developed to safeguard the identity, physical integrity, and contents of the recordings to assure their admissibility in evidence. Immediately upon the termination of the interception, the records must be made available to the judge who issued the order and sealed. Custody of the records shall be wherever the judge orders. Most law enforcement agency's facilities for safekeeping will be superior to the court's and the agency normally should be ordered to retain custody, but the intent of the provision is that the records should be considered confidential court records." (1968 U.S. Code Cong. & Adm. News, p. 219[illegible] [Emphasis supplied]).

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*The term "immediately" is defined in Webster's New World Dictionary, Second Edition, to mean "without delay; at once, instantly". Black's Law Dictionary, Fourth Edition, noted the words "immediately" and "forthwith" have the same meaning. They are stronger than the expression "within a reasonable time" and imply prompt, vigorous action without any delay (citations omitted).

**Section 2517[5] and 2518[5].

***Section 2518[8][c].

This strict construction has been recognized in a number of decisions (see: U.S. v. Gigante [supra]; People v. Nicoletti, 35 N.Y.2d 249, 356 N.Y.S.2d 855 [N.Y. Court of Appeals : 1974]; People v. Sher, 38 N.Y.2d 600, 381 N.Y.S.2d 843 [N.Y. Court of Appeals : 1976]).

The language of the statute is quite clear as is its mandate (U.S. v. Gigante [supra]). The need for strict construction became obvious when we consider the peril it was designed to avert in a time of such sophisticated electronic equipment and technique. It is the latter concept that has led the courts to dispense with any showing on the part of the defendant that there was, in fact, tampering (ie., prejudice). (See: U.S. v. Gigante [supra]; People v. Nicoletti [supra]; cf. U.S. v. Rizzo, 492 F.2d 443, where prejudice had to be shown to suppress tapes for failure to give notice).

Thus, it is submitted that the failure to apply for the extension for three or six days thereby delaying the period within which to seal, equals a failure to seal immediately. The equating of a delay in applying for an extension with a failure to seal where the "extension" is sought to be used as the measuring time was recognized by the Court in U.S. v. Gigante [supra] where, at pages 507 and 508, the Court remanded for the trial court to determine:

> "...[2] if it was such an extension, whether the explanation for the delay of thirteen days in obtaining the extension from November 24 to December 8 is sufficient to excuse the delay in sealing."

After the remand to the District Court and prior to a hearing on the issue, the Government nolle prossed the case. This action on their part may be considered a recognition that the 13 day delay in obtaining the extension is fatal. It may even be suggested that it is a recogni-

tion that there cannot be a true extension once the prior order had expired.

We submit that at bar there was no explanation for the delay. The basis for waiting until the next order was signed seemed merely to be a matter of convenience. There was certainly no need to use the tapes for making transcripts as duplicate tapes were immediately made and could be used for making transcripts (see: People v. Nicoletti [supra]). The rationale of sealing, ie., to insure the integrity and reliability of the tapes, was undermined at bar not only by the delay but also by the vagueness of security of some, if not all, of the tapes (see: U.S. v. Ricco [supra]).

The supervising agent, Parsons, testified that some of the tapes were held by the monitoring agents over night and not delivered to him until the next day, that when he was through duplicating the tapes, he locked them in a file cabinet stored in a room where at least 100 agents were present. He believed, but was not sure, that he had the only key. During his absence, he entrusted the duty of storing the tapes to another agent and no evidence was adduced by the Government as to what that agent did during this period. The tapes, even when stored, were not sealed; they remained in their unsealed box in the cabinet until a quantity of them were placed into a large cardboard box. The larger box, not individual tapes, was sealed by the judge, so there was no way of knowing what it was that the judge was sealing.

While the statute does not require that a formal order be signed to evidence sealing, nevertheless, the cavalier approach used at bar seems to violate the spirit of the statute when we look at the sealing order of Judge Neaher on May 24, 1973 which refers to the sealing of tapes of conversations recorded pursuant to an order of February 20, 1973. There is, of course, no record of that proceeding, so one is not sure what was represented to Judge Neaher as being contained in that box which held many tapes.

It must be remembered through all of this that since proper sealing must be established as a predicate to using the tapes and the defendant need not demonstrate tampering or prejudice, the burden to establish proper sealing is solely and heavily upon the prosecution. Therefore, the failure to clarify the procedure of custody, the mass rather than the specific sealing, the incongruity of the order of May 24, 1973 and the absence of proof on the actual procedures used before Judge Bartels and Judge Neaher should be construed against the Government and the motion to suppress should have been granted.

POINT III

THE COURT ERRED IN FAILING TO GRANT A SEVERANCE AND A MISTRIAL.

To save repetition of the general statements of the law and facts applicable to this point, we hereby adopt and join in Point I of the brief on behalf of JAMES NAPOLI JR. on the issue of severance and mistrial. We will limit our comments to those facts specifically applicable to the defendant VIGORITO. As indicated, the trial lasted some six weeks; the evidence against VIGORITO consisted of physical surveillance showing his presence, five telephone conversations which lasted no longer than a cumulative total of 20 minutes, and the two year old fingerprint on the blank side of a piece of paper. It is not idle speculation to suggest that the only evidence of complicity could have been the intercepted conversations and of them, as Point I suggests, the only real evidence is the conversation of April 30, 1973. Thus, the possibility of prejudicial spillover has even greater effect upon the defendant VIGORITO. The testimony particularly involving the premises on East 2nd Street, the ensuing searches and seizures from those premises, from vans, from individuals, and the extensive interception in apartment 309 consumed weeks of trial time. No matter how careful or well intentioned the instructions to the jury, the chance of prejudicial spillover was great. The limitation on cautionary instruction was recognized in the decision in Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620 [1968], at page 1627 of the Supreme Court decision, where the Court noted:

> "Nevertheless, as we recognized in Jackson v. Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

At bar, the Court recognized prejudicial spillover implicitly in its dismissal of the conspiracy count. This prejudice was certainly not lessened in the trial of three unrelated substantive acts. Particularly is this the case when the only theoretical nexus was the so-called theory of one head but yet that head was not even named in the respective counts, and that theory was specifically rejected by the trial court in its dismissal of the conspiracy count.

It should also be noted in passing that the substantive counts in this particular case speak in the same language as conspiracy. In fact, the trial court, in its colloquoy and its charge to the jury, treated the count as a conspiracy.

The court stated in colloquoy that in any joint crime, where an agency is shown, the Government is bound the same as if a conspiracy was alleged [A-154], even though in its strictest sense it is not a conspiracy; it is in the logical sense a conspiracy [A-155]. The charge that would be relevant to a conspiracy would be relevant to a business, etc. [A- 155]. The court went on to use all of the language appropriate to conspiracy when discussing the nature of the substantive counts, ie., agency [A-156], partnership [A- 167], three separate businesses [A-167]. The court expressly recognized that there was no difference between the business and conspiracy and that appellate courts would follow conspiracy ruling in these business type counts [A-157]. While discussing the counts, the court kept referring to conspiracy [A- 158, 163, 164, and 168]. In its charge, the trial court utilized the terminology of conspiracy, ie., joinder in business [A- 55] and even indicated that the Government had to show that an individual had a connection with the conspiracy [A- 62].

The appellate courts have recognized that language such as joint venture or partnership is that of conspiracy (see: U.S. v. Tramunti, 513 F.2d 1087 [2 Cir. 1975]).

Thus, in effect, the Court, despite the dismissal of the conspiracy count, by its refusal to allow severance of the substantive counts, allowed three separate unrelated conspiracies to be tried together.

A separate basis for the severance exists on behalf of the defendant VIGORITO. This basis is the tremendous disparity of evidence, ie., the paucity of the evidence as previously outlined, both in amount and quality as against the defendant VIGORITO. This was recently recognized as a basis for a severance for the defendant Mardian in the case of U.S. v. Mardian, 20 Cr.L. 2109, 2110 [D.C. Cir. 1976]; see also: U.S. v. Kelly, 349 F.2d 720 [2 Cir. 1965].

For all of these reasons, the defendant VIGORITO was entitled to a trial where he alone was faced with the necessity of meeting the evidence against him - not the vast amount of evidence, concededly unrelated to him, and where one has to speculate upon its effect upon him.

POINT IV

THE DEFENDANT VIGORITO HAS STANDING TO CONTEST THE INTERCEPTIONS AS A RESULT OF THE "BREAK INS".

As part of the motion to suppress, it was developed that the agent conducted unauthorized break ins to the Highway Lounge. The trial court held that only one defendant had standing because he showed a proprietary interest. To avoid unnecessary duplication, the defendant VIGORITO adopts the arguments of the defendant NAPOLI JR. in Point II of his brief on standing except that he does not contend that he has any proprietary interest.

We suggest that in furtherance of those arguments that the trial court's reliance on Brown v. U.S., 411 U.S. 223, 93 S.Ct. 1565 [1973] was misplaced. The trial court's decision seems to suggest that Jones v. U.S., 362 U.S. 257 [1960] was per se overruled. This was recently held not to be so in this Circuit (see: U.S. v. Galante, slip opn. Dec. 14, 1976, p. 959, 2 Cir. 1976).

This Court in footnotes recognized as still viable other bases for standing attendant to electronic interception (see: footnotes 11 and 12 on pages 967 and 968).

Here, based upon surveillance, actual interception of conversations of VIGORITO and the service of an inventory, he was one of the persons entitled to protection (see: Katz v. U.S., 389 U.S. 347 [1967]; Alderman v. U.S., 394 U.S. 168 [1969]; U.S. v. Galante [supra]).

The trial court recognized VIGORITO'S standing to contest the intercepts at the Highway Lounge on all other grounds, ie., sealing, minimization, construction, probable cause, the so-called "Kahn" issue, etc.; thus, the trial court's variance on the break in creates the

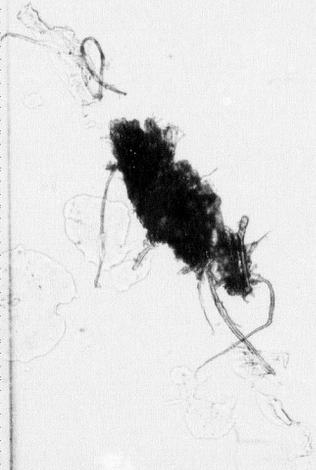
anamolous position feared by this Circuit in footnote 13 of U.S. v. Galante [supra].

The Court in arriving at its conclusion of lack of standing overlooked the statutory basis for standing. Section 2518[10][a] provides that any "aggrieved" person may move to suppress the contents of any intercepted communication. Section 2511[11] defines an aggrieved person as a party to any intercepted oral communication. Defendant VIGORITO'S oral communications were intercepted; thus, he has standing to contest such interception if obtained through an unlawful break-in, whether or not he was on the premises or had a proprietary interest in the premises at the time of such break-in.

Based upon the trial court's finding of standing on all other issues, and the authorities cited in this point and Point II of the defendant NAPOLI JR.'S brief, it is submitted that the defendant VIGORITO has standing.

POINT V

THE DEFENDANT VIGORITO ADOPTS AND JOINS IN ALL OTHER BRIEFS AND POINTS OF THE CO-DEFENDANTS WHERE APPLICABLE.



CONCLUSION

THE CONVICTION SHOULD BE REVERSED, THE TAPES SHOULD BE SUPPRESSED AND THE INDICTMENT DISMISSED OR, IN THE ALTERNATIVE, THE MATTER SENT BACK FOR A NEW TRIAL.

Respectfully submitted,

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FOOTNOTE 1 - April 27th, 1973

JN I thought he hung out with JOE BLACK

JN I just got through asking.

SV You don't know him.

JN What was they guy a big guy this Sabu.

SV No a little, no a little guy

SC Inaudible

JN Says Anthony sent him

SV Anthony sent him. He's with ANTHONY, with ANTHONY, his name is SABU (PH) checked colored jacket on.

FOOTNOTE 2 - April 30, 1973

U I didn't say you weren't very nice.

N (inaudible)...get a hit, you get it...if you would have said to me "Hey listen Sally, I owe you three thousand dollars, I'm coming down to pay you,...(inaudible)...

U (Inaudible)..., the worst is over.

N I wouldn't have been so goddammed aggravated, but you got me steamed inside. I don't want to give you two cents.

U I've been trying to knock it down (Inaudible)..., I tried to bring it down four hundred dollars.

S You tried to bring it down? because you got hits? (Inaudible)...

S What did you do with all this business? Where's all the business?

N You can't look to pay for it...You can't look to do (overtalking)

S He hasn't got the volume, the business...(inaudible)...You tell me you are working every night till seven o'clock, now you ain't. (Inaudible)...

N How did you neglect this thing to get the three thousand dollars, aside from the personal money? That was lent to you. If you're responsible you don't neglect things like that, and you live up to your word, number one. Number two you got a business that you are earning from and you let it go to pieces. You got no sense. You got anybody in the shop to pick it up.

U I work for a shop if there's a problem on the outside I adjust the problem...

N You got a problem right here to adjust.

U (Inaudible)...It just so happens I wind up with a job...one day and that's all.....

S Tell us, tell us why, why do you think we should give you money? ...For three weeks foward we've been trying to get some money out of you. Gotta send a guy down every day...you give less than you turn in.

U You're kidding like tomorrow. Like tomorrow....Money

N How much..., Richy.

S You took the money

U Inaudible.

(FOOTNOTE 2 - CONTINUED)

N Yeah, but what do ya do with all the money if you turn it in. You turned in $300 dollars worth of action today without a penny.

U Inaudible

N You got three thousand dollars in money, right? Now you come here with a $5 hit, you come here with a $5 hit and, you're looking for help, how much help you looking for and only if we want to take another chance with ya and only if you can pay this thing every day.
(Inaudible).....

U ....I got a bill right now....if it's all right with you and if I can have like two thousand dollars...I will give you back nine hundred dollars, nine hundred, nine eighty eight.

N Nine hundred

U Nine Eighty-Eight, nine eighty-eight.

N Off what.

U Nine Eighty-Eight, that will leave me fifteen hundred dollars owed...Fifteen hundred dollars.

S What about this week's action?

N What do we do with this week's action?

U Wait now, if it's all right with you...If it's alright with you, 150 dollars a week.....

S You took the thousand dollars, you said you were going to give me two hundred dollars a week, you didn't. You give me a hundred and thirty dollars and God knows,....(inaudible)...when you took this money you took it with this understanding. Right you're taking this money and....hustling cigarettes. And you're making six hundred dollars with every load.

U (Inaudible)....Bill is high but it's been always been high for a long time, it ain't that it's going higher and higher.

S (Inaudible)....the business was high until the business went down...

S When that guy propositioned my son, to take it without you I came up to you like a man. I told you what the guy was trying to do. I never looked to hurt you, but ah, you ain't doing the right thing, Ed, I told you, you can't scupe me. Now, all of a sudden we see you because you have the $5 hit. I had to go to these people, these people want to know why I owe them. You owe me. How the hell am I going to pay these people? Those are not your

(FOOTNOTE 2 - CONTINUED)

S hits. They look at me and say "What do you do with out money." I got to tell them that Richy...goes and buys cigarettes with it.

U I don't go buy cigarettes with it.

S What do you do with it them? What do you do with it?

U (Inaudible)

N All right, now answer this, why is it been hot.

U (Inaudible)...He owes me himself a 150 dollars...900 dollars... Take out what he owes me, he owes me 180 dollars.

N When will you bring in the 988?

U ...I'll give you three, three and three. Three tomorrow, three Wednesday, and three Thursday.

N You are going to come in here three days in a row? And give me three hundred a day?

U Yeah.

N And you are going to pay your bill currently.

U I'll pay you. I'd rather pay the bill. I would like to pay the bill...from now on on Wednesday. (Inaudible).....

N Listen to me, you see what you done with Sally? I'm taking the shot with you not Sally. I'm going to come looking for you not Sally. And I don't make it a habit of doing that Richey. I don't even make it a habit of talking like this. When I talk to a guy, I open my heart up to him, and he tells me I don't have anything to worry about and then I don't see him. Then I sent for him and you didn't come and then you come and you got a $5 hit. You have a lot of catching up to do as far as your character with me is concerned. I'm going to take a shot with you this trip. Does fifteen hundred dollars help you.

U (Inaudible) twenty-five hundred...three hundred.....

N Do you understand what figure he's talking about?

S I know what he's talking about. (Inaudible)...

U Hundred fifty dollars...1500 dollars.

N In other words, you want two thousand, and you'll owe 988 at the end of the week.

U At the end of this week I'll owe you the balance.

(FOOTNOTE 2 - CONTINUED)

N Without this week's action?

U Yeah.

N What do we do with that?

U (Inaudible).....

S They are supposed to hold back a week's action.

N Is that right, holding back a week's action?

S Yeah, that's what I always had with him. But he can't.....

N Well, I don't want no more problems with you Richey, I got too many other problems. Sally has too many other problems. Without you telling me this problem and me telling you mine. If you can't meet up with this hit just leave the action there and we'll go pick it up. I'll find a guy...and do it the right way that's your problem but don't think you can come here three times and bull shit me. Once maybe. The second time I'll give you another chance, but after that you ain't bull shitting me any more. Just leave the action here we'll send a guy in to pick it up and take it out with no problems. Do you want to see that?

S (Inaudible)....

N We try to eliminate all kinds of tragedies here, were the most liberal people you can deal with. You should know that by now. You want to give him the two?

S Yeah.

N Thank him, he's gonna give it to ya.

N If you were dealing with me Richey you wouldn't have got this far. We would have had an understanding from the beginning. This is tough money. It's not easy, we have a lot of cops to pay, a lot of people to smear at the top. A lot of things going on, without explaining this...(inaudible)...it's not all our shit. It's all of what's happening...(inaudible)...today... we eliminate as I say alot of tragedies..We don't look to hurt nobody what we're looking to do...trouble we're the first guys to help him when you come in here with a bullshit story. I can't take that...you told me inside you agreed to give me some big money that's what you told me. You didn't tell me 200 this week and 200 next week, you said some big money. If you would have told me inside that I'm paying 200 a week sure your gonna live up to that what you're saying right now is 300, 300 and 300, make sure you live up to that. If you get anymore hits you won't have to worry about getting the money, you're going to get paid and you know it.....(inaudible)

FOOTNOTE #3 - May 12th, 1973

SV: (Music still on) There is a guy sitting out here, he was here during the week and he's here again sitting out there. This guy said, "I got fuckin' sent here." He played numbers with this kid uh Conrad, this dirty kid, you understand, he is (inaudible). Haven't seen Conrad in three weeks, four weeks. Ain't paid me. Now Conrad got sick (inaudible). He originally spoke to to (inaudible) so he couldn't get nothing, so he told Conrad. Conrad said they ain't nothing I can do. He spoke to Smith and Jimmy said there's nothing I can do, right. Now they sent him, going back to Conrad. Conrad says the only guy can help you is Jimmy Napp, right. Now he comes up here during the week to see Jimmy Napp and he knows Joey G, right, (inaudible).

JNJ: No Joey G., you don't know!

SV: So he says go see Jimmy Napp, right, Joey says, how are you. Tell him explain to Jimmy this guy wants to talk to him, you know what I mean. He wants to know what he can do about it getting your father to talk to him. Okay, either he gets paid or he don't. You know what I mean.

JNJ: (Inaudible)

SV: You wantta tell him (both talk). I hear he did the same thing the other day.

JNJ: He ain't going to be satisfied talking to me.

SV: You're father's been so busy, I can't tell your father.

(FOOTNOTE #3 - Continued)

JNJ: I don't know the story. This guy, you thinking he looking to get paid?

SV: If he get's it, he get's it. If he don't.

JNJ: How much is the hit?

SV: I think a thousand, I think a thousand. (Inaudible) Conrad should've came with you, I said maybe he couldn't do it with Sammy, but he should've came with you.

JNJ: That's right.

SV: Why send him over here with us, you know what I mean. (Shote pause)

SV: I think, I think.

JNJ: (Inaudible)

UM: Come on in

(Short pause)

JNJ You startled me there, I just found out all the particulars on this.

FOOTNOTE 4 - May 14th, 1973

JN I don't know the story too good ANTHONY. (Pause) Hey SALLIE! (Pause) this here I couldn't understand. He says, "We know that youse got (inaudible) pay this guy every month." What's the story about that RAYMOND, SALLIE?

SV (Couple of words covered) the cop that come here?

JN Yeah.

SV Uh "that you got, I hear you got a RAYMOND." I said yeah, he come by here, I says uh, I says uh he went to Puerto Rico. He said "Nay" (inaudible). I said I was told that I says (inaudible). "But now he's back with you, right?" I says yeah, he's back with us. (Inaudible) however RAYMOND'S back with us. He said, us "he's givin' you about fourteen thousand, right?"

JN (Unclear)

SV These cops they took it off, when, when, when he uh got grabbed?

JN They got the money?

SV Yeah.

JN Cops?

Unknown The cops picked 'im up.

JN When, when they gave 'im the pinch?

SV Yeah.

JN (Unclear) ask of you. Did you ask 'im, what'd you knew, how'd you know?

SV I've known this man for years with the Boro.

JN What is he (SV breaks in).

SV Now he's a sergeant, but he takes the money for the inspector over here, the Boro, you understand? So now he told me that there's been information that there's been guys (inaudible) and then he wanted to know especially about RAYMOND. He knows all about.

JN Now, this division. Does this division goin' around five Boros?

SV Yeah.

JN You eliminate

SV Yeah, eliminate people.

(FOOTNOTE 4 - CONTINUED)

A People been eliminated for the past year (inaudible), and we still had them. We had them over here (inaudible). People been eliminated for the past year.

JN Well, that was uh not division, that was more the squad, wasn't it? This is a new.

SV (Unclear)

FOOTNOTE 5 - May 15th, 1973

JN Sally!!

Rosie Sally!!

SC (Inaudible)...the Division's out.

JN You can hear it from the horse's mouth. Can you spare a moment, Sally?

SV Yeah, sure.

SC I told this guy, you wanta kid me?

JN No, get the true facts. What we were talking about yesterday that that guy told you. That copper.

SV No more Division. No more Division.

JN As of when?

SV As of the fifteenth. All finished. Only thing got left now is Boro.

JN What'd he tell you about the other guy?

SV He said, I told him, I said, well how come this Barbado (ph). Yeah, he's a cunt. He's a cunt. Exact words.

Can you tell us from the context of that conversation what it refers to, sir?

A The five and a half part, that is paying off the winning bets at the rate of five fifty for one.

And the ten, what they are talking about is after the paying of the five fifty for one and the paying of 35 percent, over the long run probabilities tells they would be paying out about 90 percent of the money they take in, leaving 10 percent left over for the net profit. And they are saying we don't advertise this, but this is the net profit, 10 percent of what we turn in.

Q CAn you tell from the context of that conversation, sir, what position, if any, a person would have in the policy business, who was talking like that?

A Certainly the 10 percent they are talking about is the final net profit, that is the net profit after paying of the controllers, the runners, the hit, and so forth. That is the theoretical operating profit. So this would be somebody that's involved in this top, that would be involved in the 10 percent.

Q Now, can you refer, please, to the April 30th transcripts, and again read off the exhibit number, please.

A I have 275-A.

Q And I will refer you to page 5 of the transcript.

Now, would you assume, sir, that Mr. NApoli, Jr. said -- excuse me, I will refer you down to near the bottom of the page of that transcript.

And assume that Mr. Napoli, Jr. says, without this week's action --

And an unknown subject says, yeah.

And Mr. Napoli, Jr. replies, what do we do with that?

And Mr. Vigorito says, they are supposed to hold back a week's action.

And Mr. Napoli, Jr. asks, is that right? Holding back a week's action?

And Mr. Vigorito replies, yes, that's what I always had with him.

Can you tell from the context of that conversation what these speakers are talking about, sir?

A They are talking about holding back or not paying up each week, not making the payment each week to presumably the runners, so they still have a cushion left over if the accounts don't pay out.

By not paying out it, I suppose, like somebody goes to work to his place of employment and they don't pay him for the first week, they hold that back, so they have kind of like a cushion left over.